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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937 8

No. 860 11

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

ROBERT C. WINMILL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 12, 1938
CERTIORARI GRANTED APRIL 11, 1938

SUPREME COURT OF THE UNITED STATES

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Before United States Board of Tax Appeals

Docket No. 79,036

ROBERT C. WINMILL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances:

For Taxpayer: Thomas M. Wilkins, Esq., William E. Hayes, Esq.

For Commissioner: John H. Pigg, Esq.

1935

Apr. 10—Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 11—Copy of petition served on General Counsel.

Apr. 27—Answer filed by General Counsel.

May 6—Copy of answer served on taxpayer.

May 8—Notice of appearance of Thomas M. Wilkins as counsel filed.

Sept. 9—Hearing set October 28, 1935.

Oct. 16—Motion to place on the Circuit Calendar for hearing in vicinity of New York City filed by taxpayer. October 18, 1935, granted.

1936

Mar. 5—Hearing set May 12, 1936, at New York, New York.

May 12—Hearing had before Mr. Mellott on merits. Submitted. Stipulation of facts as filed be admitted in evidence. Stipulation of facts filed. Briefs due as per rules.

June 2—Transcript of hearing of May 12, 1936, filed.

July 17—Motion for leave to file brief, brief lodged, filed by taxpayer. July 18, 1936, granted.

July 20—Copy of motion and brief served on General Counsel.

July 25—Memorandum brief filed by General Counsel.

Aug. 31—Reply to memorandum brief filed by taxpayer. September 1, 1936, copy served.

1937

Mar. 31—Opinion rendered, Arthur J. Mellott, Division 11. Judgment will be entered under Rule 50.

Apr. 5—Motion to vacate decision and reconsider issues filed by taxpayer. April 12, 1937, denied.

Apr. 20—Motion to grant a rehearing and reconsider opinion filed by taxpayer. Brief in support of motion attached April 26, 1937, denied.

Apr. 28—Notice of settlement filed by General Counsel.

Apr. 30—Consent to settlement filed by taxpayer.

May 3—Decision entered, Arthur J. Mellott, Division 11.

May 28—Motion to fix amount of bond in the amount of \$7,750.00 filed by taxpayer.

May 28—Order fixing amount of bond at \$7,750.00 entered.

June 30—Supersedeas bond in the amount of \$7,750.00 approved and ordered filed.

3 July 6—Petition for review by United States Circuit Court of Appeals (Second) with assignments of error filed by taxpayer.

July 6—Proof of service filed by taxpayer.

July 15—Agreed statement of evidence lodged.

July 15—Præcipe filed by taxpayer.

July 15—Proof of service of præcipe filed.

July 15—Agreed statement of evidence approved and ordered filed.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed April 10, 1935

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his deficiency notice (Bureau symbols IT:AR:A-2-LHA-90D) dated January 14, 1935, and as a basis of his proceeding alleges as follows:

4 1. The petitioner is an individual with his place of business at 1 Wall Street, New York, New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 14, 1935.

3. The taxes in controversy are Federal income taxes for the calendar year 1932. The deficiency asserted is \$5,508.14, the entire amount of which is in controversy.

4. The following assignments of error are alleged by the petitioner to have been committed by the Commissioner in determining said deficiency:

"(a) Failure of the Commissioner to allow as a deduction, losses in the amount of \$8,473.06 sustained by this petitioner through the partnership of Gude, Winmill & Co. in the sale of stocks and bonds during the taxable year which were held by the petitioner for less than two years.

"(b) Failure of the Commissioner to offset against the petitioner's income from sales of stocks and bonds during the taxable year, which were held by him for less than two years, through the partnership of Gude, Winmill & Co. of which petitioner was a member during the taxable year, losses in an equal amount, namely, \$8,473.06, sustained by the petitioner from the sale during the taxable year of stocks and bonds held by him for less than two years.

5 “(c) The disallowance by the Commissioner of losses sustained by the petitioner during the taxable year in the amount of \$2,247.65 on the sale of stocks and bonds held by him for less than two years.

“(d) The failure of the Commissioner to offset losses of the petitioner in the amount of \$2,247.65 sustained during the taxable year from the sale of stocks and bonds which were held by the petitioner for less than two years against gains in an equal amount, namely, \$2,247.65, from the sale by the petitioner during the taxable year of stocks and bonds held by him for less than two years in joint account in which the petitioner had a direct fractional interest.

“(e) The disallowance by the Commissioner of commissions paid or incurred during the taxable year in carrying on the petitioner's trade or business in the amount of \$19,045.25.

“(f) Failure of the Commissioner to allow as a deduction during the taxable year, commissions in the amount of \$19,045.25 paid by the petitioner during the taxable year in carrying on the petitioner's trade or business.

“(g) The disallowance by the Commissioner of stock losses in the amount of \$172,771.02.

“(h) Failure of the Commissioner to allow as a deduction during the taxable year, stock losses in the amount of \$172,771.02.”

6 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

“(a) During the calendar year 1932 petitioner actively carried on the business of speculating, trading or dealing in stocks and other securities. Practically all of the petitioner's time devoted to his business affairs was spent in speculating, trading or dealing in stocks and bonds. During the taxable year the petitioner's losses from sales or exchanges of stocks and bonds held by the petitioner for less than two years exceeded the gains from such sales or exchanges during the taxable year by \$162,050.31. Included in such gains of the petitioner during the taxable year 1932 were gains in the amount of \$8,473.06, which said gains were derived through the sale by the petitioner during the calendar year 1932 of stocks and bonds which had been held by the petitioner for less than two years, through the partnership of Gude, Winmill & Co., 1 Wall Street, New York, New York. Included in such gains of the petitioner during the taxable year 1932 from the sale of stocks and bonds held by him for less than two years are gains in the amount of \$2,247.65 which gains were derived from the sale by the petitioner during the year 1932 of stocks and bonds which were held by the petitioner for less than two years in certain joint accounts in which the petitioner held a direct fractional interest during all of the calendar year 1932. The joint ac-

count designation and the interests of the petitioner in the gains from the sale in such accounts during the calendar year 1932 of stocks and bonds held for less than two years, are set forth below:

"W. H. Short a/c	-----	\$501.25
"R. C. Winmill #825 a/c	-----	146.56
"#33-1 a/c	-----	360.27
"#33-2 a/c	-----	1,239.57
		\$2,247.65

"(b) The Commissioner of Internal Revenue in determining the deficiency erroneously refused to apply the gains of the petitioner from the sales during the taxable year of stocks and bonds held for less than two years in the amount of \$8,473.06 against losses from such sales incurred by the petitioner during the same year on the ground that the gains in the said amount of \$8,473.06 were the gains of the partnership of Gude, Winmill & Co. and, hence, were not the gains of this petitioner. On this ground the Commissioner erroneously added to the income of this petitioner for the calendar year 1932 \$8,473.06.

"(c) The Commissioner of Internal Revenue in determining the deficiency of this petitioner refused to apply against the losses of this petitioner from the sales of stocks and bonds held less than two years, the amount of \$2,247.65 representing the gain derived by this petitioner from the sale of stocks and bonds held for less than two years directly through joint accounts. The Commissioner, therefore, erroneously added to the income of this petitioner for the calendar year 1932 \$2,247.65 on the erroneous ground that this income, although derived by the petitioner from the sale of stocks and bonds held by him less than two years, cannot be offset against the petitioner's losses on sales of stocks and bonds held less than two years in a different joint account or as an offset against the petitioner's losses otherwise sustained from the sale of stocks and bonds held for less than two years.

"(d) In computing the limitation on stock losses under Section 23 (r) of the Revenue Act of 1932 the Commissioner erroneously computed the excess of losses from sales or exchanges of stocks and bonds over the gains from such sales or exchanges during the taxable year 1932 as \$172,771.02, instead of only \$162,050.31. The difference between these two sums, namely, \$10,720.71, is made up of (a) the \$8,473.06 item representing the excess of gains of the petitioner derived through the partnership of Gude, Winmill & Co. of which the petitioner was a member, from sales of stocks and bonds held less than two years over losses sustained from sales of stocks and bonds held less than two years, and (b) the \$2,247.65 representing the excess of gains of this petitioner derived through joint accounts from the sale of stocks and bonds held by the petitioner for less than two years over losses sustained from sales of stocks and bonds held less than two years.

9 "(e) During the calendar year 1932 the petitioner was actively engaged in the carrying on of a trade or business, namely, that of speculating, trading or dealing in stocks and bonds. Practically all of the petitioner's time devoted to his business affairs was spent in the conduct of such trade or business. During the calendar year 1932 in the course of the conduct of such trade or business the petitioner made 816 purchases and sales of stocks and/or bonds. These transactions involved purchases of 64,517 shares and involved the sale of a like number of shares, 64,517 shares. These said shares of stock were purchased for a total cost of \$2,961,254.95 and were sold for \$2,781,533.99. - On these purchases and sales so made during the calendar year 1932 by the petitioner in the conduct of the said trade or business, the petitioner paid brokerage commissions in the amount of \$19,045.25. The total buying and selling commissions paid by this petitioner in connection with the 816 trades completed by the petitioner during the calendar year 1932 on the said purchase and sale of 64,517 shares of stock above referred to totaled \$19,224.75. This amount represents the buying commissions on securities long on January 1, 1932 which were sold during the year 1932, plus the selling commissions thereon and the buying and selling commissions on securities which were bought and sold during the year 1932. The commissions on securities bought and held over the end of the 10 year 1932 are not included. The purchase commissions on securities long January 1, 1932 in the petitioner's various accounts amounted to \$602.50 (this amount is included in the \$19,224.75 item). The purchase commissions on securities long December 31, 1932 in the petitioner's various accounts amounted to \$403.00 (this amount is not included in the \$19,224.75).

"(f) In computing the said deficiency the Commissioner erroneously added to the cost of shares sold by the petitioner during the calendar year 1932, commissions in the amount of \$19,224.75. Thus, by adding commissions to the cost of stock sold during the calendar year 1932 and by erroneously disallowing \$172,771.02 of the loss sustained, the Commissioner erroneously disallowed in excess of \$17,000.00 of the said \$19,224.75 commissions paid or incurred during the calendar year 1932 in the course of petitioner's trade or business of speculating, trading or dealing in stocks during the said year."

6. Wherefore, the petitioner prays that this Board may hear the proceeding and determine that there is no deficiency due from the petitioner for the calendar year 1932.

(Signed) Thomas M. Wilkins.

THOMAS M. WILKINS.

(Signed) William E. Hayes.

WILLIAM E. HAYES,

Counsel for Petitioner.

602 Shoreham Building, Washington, D. C.

[Duly sworn to by Robert C. Winnill; jurat omitted in printing.]

Exhibit A to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Jan. 14, 1935.

Mr. ROBERT C. WINMILL,
% Gude, Winnill, and Company,
1 Wall Street, New York, New York.

SIR: You are advised that the determination of your income tax liability for the year(s) 1932 discloses a deficiency of \$5,508.14 as shown in the statement attached.

12 In accordance with section 279(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
By (signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures: Statement. Form 870.

IT:AR:A-2.
LHA-90D.

In re: Mr. Robert C. Winnill, % Gude, Winnill and Company, 1 Wall Street, New York, New York

Income Tax Liability Year 1932; Income Tax Liability \$5,508.14; Income Tax Assessed, None; Deficiency \$5,508.14.

The deficiency shown herein is based upon the report dated June 29, 1934, prepared by Revenue Agent John A. O'Brien, and transmitted to you under date of September 25, 1934, which report has been reviewed and approved by this office.

The principal issue involved is whether losses from sales of securities held less than two years may be applied against other income,

and profit derived through joint trading accounts. This loss has been disallowed as a deduction by this office, inasmuch as the Revenue Act of 1932 does not contain any provision whereby losses on sales of stock held less than two years may be applied against other income or offset income from joint trading accounts in securities.

A synopsis of your adjusted income tax liability follows:

14	Income shown on return (loss)	\$138,546.44	
	Add: Partnership income (decrease)	8,473.06	
	Total (loss)	\$145,019.50	
Add:	Stock profit joint accounts	\$2,247.05	
	Stock losses	172,771.02	175,018.67
	Adjusted income	\$29,999.17	
Add:	Capital net loss	22,560.05	
	Income subject to surtax	52,559.22	
Less:	Dividends	\$11,785.00	
	Personal exemption	44,100.00	15,885.00
	Income subject to normal tax	\$36,674.22	
	Normal tax at 4% on \$4,000.00	\$160.00	
	Normal tax at 8% on \$32,674.22	2,613.94	
	Surtax on \$52,559.22	5,554.21	
	Total	\$8,328.15	
Less:	12½% of capital net loss of \$22,560.05	2,820.01	
	Total tax assessable	5,508.14	
	Tax previously assessed	None	
	Additional tax to be assessed	\$5,508.14	

15. In accordance with telephone instruction of your representative under date of December 31, 1934, the formal notice of deficiency is now being issued.

A copy of this letter, together with a copy of the statement, has been mailed to your representative, William E. Hayes, Little Building, Boston, Massachusetts, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed April 27, 1935.

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer; admits and denies as follows:

1. Admits that the petitioner is an individual with place of business at 1 Wall Street, New York, New York.

16 2. Admits that a notice of deficiency was mailed to the petitioner on January 14, 1935, and that a true and correct copy of said notice of deficiency is attached to the petition.

3. Admits that the taxes in controversy are Federal income taxes for the calendar year 1932, but denies that the amount in controversy is correctly stated in paragraph 3 of the petition.

4. (a) to (h), inclusive. Denies that the Commissioner of Internal Revenue erred in manner and form as alleged in subparagraphs (a) to (h), inclusive, of paragraph 4 of the petition.

5. (a) to (f), inclusive. Denies all the allegations of fact as set forth in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:

E. L. CORBIN,

Special Attorney, Bureau of Internal Revenue.

ELC-GA 4-26-35.

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Before United States Board of Tax Appeals

Docket No. 79,036

ROBERT C. WINMILL, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Opinion

Promulgated March 31, 1937

Taxpayer, a member of a partnership engaged in the stock brokerage business, operated three securities trading accounts as an individual and also operated four accounts jointly with others. During the taxable year he reported a gain from his partnership interest and from the operation of the joint accounts and a large loss from the operation of his individual accounts. All of the securities sold were noncapital assets. In computing the amount of the loss and gain on these accounts, buying commissions were included as part of the cost and selling commissions as an offset against the selling price. Held:

"(1) Section 23 (r) of the Revenue Act of 1932, limiting the amount of losses on the sale of noncapital assets to the gains from the sale of such assets, is constitutional.

"(2) Taxpayer's gains from the partnership and from the joint accounts can not be offset against the losses sustained on his individual accounts.

18 "(3) Commissions paid to brokers in buying and selling securities are not deductible either as ordinary and necessary business expenses or as losses sustained. Commissions paid in purchasing securities are a part of the cost and those paid in selling securities are an offset against the selling price."

Thomas M. Wilkins, Esq., for the Petitioner. John H. Pigg, Esq., for the Respondent.

MELLOTT: Petitioner seeks redetermination of a deficiency in income tax for the calendar year 1932 in the amount of \$5,508.14. In his income tax return for said year he reported as income and claimed as deductions items as follows:

INCOME

Line 3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)	\$29,876.34
Line 5. Income from partnerships, Syndicates, Pools, etc. Gude-Winmill & Co., No. 1 Wall Street, New York, New York	27,984.15
Line 8. Loss on Sale of Stocks, Bonds, etc. (From Schedule C) In connection with business	\$172,771.02
Line 10. Dividends on: (a) Stock of Domestic Corporations subject to taxation under Title I of 1932 Act	\$11,785.00
Line 12. Deficit in Items 1 to 11	\$103,125.53

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DEDUCTIONS

Line 14. Taxes paid (Explain in Schedule F)	10,860.86
Line 18. Other Deductions not Reported above (Explain in Schedule F) Capital loss held over 2 years	22,560.05
Line 19. Total Deductions in Items 13 to 18	33,420.91
Line 20. Net Loss (Item 12 plus Item 19)	136,546.44
Line 22. Net Deficit for Tax Computation	136,546.44

At the hearing before us the following facts were stipulated:

"(1) During the calendar year 1932 and for several years prior thereto the petitioner, Robert C. Winmill, was a member of the partnership of Gude, Winmill & Co., with offices at No. 1 Wall Street, New York, New York, which said partnership was engaged in the stock brokerage business.

"(2) During 1932 petitioner operated three separate securities trading accounts the entire interest in each of which was his own. During that year he sold 61,992 shares of stock through said three accounts in 419 separate sales transactions representing stock purchases of 61,992 shares made through the said three accounts in 353 separate

20 purchases, the cost of which to the petitioner was \$2,884,531.14, exclusive of purchase commissions, which amounted to \$8,911.00.

Of these commissions \$1,417.50 were paid by petitioner in 1931 and \$7,493.50 were paid by petitioner in 1932. The said 61,992 shares of stock were sold in 1932 by petitioner for \$2,722,904.37. During 1932 petitioner paid brokers commissions on said sales in the amount of \$9,574.00. During 1932 petitioner also paid sales taxes on said sales in the amount of \$5,072.95.

"(3) During 1932, petitioner operated jointly with other persons four securities trading accounts in each of which he had a fractional interest, and which accounts were operated as joint ventures. Each of these accounts was operated at a profit. During that year there were sold 2,525 shares of stock through said four accounts in 22 separate sales transactions representing stock purchases of 2,525 shares made through the said three accounts in 22 separate purchases. Petitioner's share in the cost of the said 2,525 shares of stock was \$68,300.00. Petitioner's share of the buying commissions paid by him on said purchases during 1932 amounted to an additional \$270.00. The said 2,525 shares of stock were sold through the said four accounts during 1932 for an amount of which petitioner's share was \$71,687.88. Petitioner's share of the selling commissions paid by him during 1932 amounted to \$273.75. Petitioner's share of the sales taxes paid by him during 1932 on said sales amounted to \$66.83. Petitioner's 21 share of the gains from these said four joint accounts during 1932 amounted to \$2,267.80, after payment of all costs and expenses.

"(4) None of the shares sold through any of the above described seven accounts was held for two years or more.

"(5) On his 1932 return petitioner claimed a loss deduction of \$172,771.02, on account of the 419 sales transactions and the 22 sales transactions described in paragraphs (2) and (3), above. In his determination of the deficiency involved, the Commissioner disallowed the deduction so claimed on the petitioner's return, and increased the petitioner's income for the year 1932 by the following amounts:

"Stock profit joint accounts.....	\$2,247.65
"Stock losses.....	172,771.02
"Total.....	\$175,018.67

"(6) The taxes above referred to in the amount of \$5,072.95 were claimed as a deduction by petitioner in his 1932 return and were allowed by the Commissioner.

"(7) At the end of the year 1932 petitioner had on hand in his said three individual trading accounts, shares of stock on which commissions in the amount of \$403.00 were paid by him in 1932, which is not included in any of the amounts of commissions hereinabove described and set forth.

"(8) No part of the broker's commissions, above referred to, in the amounts of \$8,911.00, \$9,574.00, and \$403.00 have been allowed by the Commissioner as deductions.

22 “(9) Except as to broker’s commissions, as shown herein above, the petitioner kept his records and filed his returns, including his records and return for the year 1932, on the cash receipts and disbursements basis.”

Petitioner’s and respondent’s joint exhibit A-1 shows in detail the result of the operations of the seven trading accounts. It discloses a total loss on the sales made through the three individual accounts in the amount of \$175,038.82; said amount including commissions but not tax (the taxes having been claimed and allowed as deductions). It shows also the petitioner’s share of the net gain from the operations of the four joint stock trading accounts in which he had an interest and which accounts were operated as joint ventures, so h distributive share of the net gain being \$2,267.80.

In addition to the stipulated facts petitioner testified, and we find as a fact, that he devoted a portion of his time to the operation of the seven trading accounts.

The controversy between the parties is chiefly because the respondent applied section 23 (r) of the Revenue Act of 1932¹ and disallowed, as a deduction from petitioner’s gross income, the losses sustained by him in the several trading accounts. Upon brief, petitioner argues that the section is unconstitutional and void. The pleadings apparently raise no such issue and perhaps it should not be considered. *Frederick N. Dillon*, 20 B. T. A. 690; *Coca-Cola Bottling Co.*, 22 B. T. A. 686. But inasmuch as the section merely places a limitation upon the deduction of losses, we are satisfied that it is constitutional. “Unquestionably, Congress has power to condition, limit, or deny deductions from gross income in order to arrive at the net that it chooses to tax.” *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301, 304. *Stanton v. Baltic Mining Co.*, 240 U. S. 103; *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1, 23, 24. *Helvering v. Independent Life Insurance Co.*, 292 U. S. 371-381; *Commissioner v. Lafayette Life Insurance Co.*, 67 Fed. (2d) 209; *Lloyd v. Commissioner*, 55 Fed. (2d) 842. Any doubt which may have existed as to the constitutionality of the section is completely dispelled by the opinion of the Court of Appeals for the Second Circuit in the recent case of *Davis v. United States*. — Fed. (2d) — (Jan. 4, 1937). Nothing more need be said on this point.

Section 23 (r) being constitutional and valid, may petitioner offset his gains from the partnership of Gude, Winmill & Co. and from the four joint accounts by his losses on the three accounts owned and operated by him individually? We think not.

¹(r) LIMITATION ON STOCK LOSSES.—

(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (c) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations).

(2) Losses disallowed as a deduction by paragraph (1), computed without regard to any losses sustained during the preceding taxable year, shall, to an amount not in excess of the taxpayer’s net income for the taxable year, be considered for the purposes of this title as losses sustained in the succeeding taxable year from sales or exchanges of stocks or bonds which are not capital assets.

Section 1111 (a) (3) of the Revenue Act of 1932 defines "partnership" as follows:

24 ^a(3) The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

It is clear that if petitioner and his associates were not partners in the generally accepted sense of the term, they were nevertheless engaged in a joint venture in conducting the four joint accounts and dividing the profits and losses, and, at least for present purposes, such joint ventures must be considered as partnerships. This brings us, then, to the question decided in *Percy H. Johnston*, 34 B. T. A. 276. It was there held that a partner, entitled as such to a share of the profits of a partnership upon its sale of non-capital assets, could not in computing his individual taxable income, reduce his share of profits therefrom by the amount of his loss upon the sale of similar assets owned by him individually. Our decision was recently (December 7, 1936) affirmed by the Circuit Court of Appeals for the Second Circuit (*Johnston v. Commissioner*, — Fed. (2d) —). The court in its opinion says: " * * * the petitioner must treat his share of the partnership gain as ordinary income in his return since he cannot sustain the claimed right to have it retain there its status as a gain derived from the sale of non-capital assets, by bringing it

25 within one of the exceptions to the general rule which Congress has created." This conclusion was reached upon a consideration by the court of the various sections of the revenue act relating to partnerships, which, the court said, disclosed a scheme providing, "in general for the carrying over into his own return of a partner's distributive share of partnership income as computed in the partnership information return as so much ordinary income without noticing its source as shown by the partnership return except in those instances for which especial provision has been made." (*Johnston v. Commissioner*, supra.) We accordingly hold that the proposed offset can not be made.

The remaining contention of petitioner is that even if section 23 (r) is constitutional and applicable, nevertheless the commissions paid to brokers in connection with the buying and selling of speculative securities are deductible from gross income either as ordinary and necessary business expenses under the provisions of section 23 (a) of the Revenue Act of 1932, or as losses, under the provisions of section 23 (e) of the same act.

All of the revenue acts have allowed, as deductions from gross income, the ordinary and necessary expenses of carrying on a trade or business and losses incurred in trade or business or in transactions entered into for profit; but commissions paid in purchasing and selling speculative securities have never been held to be deductible either as business expenses or as losses. Prior to 1932, the Treasury regulations

consistently provided that commissions paid in purchasing securities are a part of the cost price of such securities and commissions paid in selling securities are an offset against the selling price.

26 Par. 108, Regulations 33 (Revised) (1916); art. 293, Regulations 45 (1918); art. 293, Regulations 62 (1921); art. 292, Regulations 65 (1924); art. 292, Regulations 69 (1926); and art. 282, Regulations 74 (1928). This regulation has been upheld by the courts and by this Board in a number of decisions. E. P. Greenwood, 34 B. T. A. 1209; Florence G. Baldwin, 23 B. T. A. 512; I. N. Burman, 23 B. T. A. 639; Frank Cavanaugh, 19 B. T. A. 1251; and Hutton v. Commissioner, 39 Fed. (2d) 459, affirming 12 B. T. A. 265.

In Hutton v. Commissioner, *supra*, the Circuit Court of Appeals for the Fifth Circuit said:

"It is clear that the taxpayer suffers no hardship by the rule, as the commission paid in purchasing the securities may be deducted from the profits or added to the losses when the securities are eventually sold."

The regulation was tacitly approved by the Supreme Court in Helvering v. Union Pacific Railroad Co., 293 U. S. 282. In that case the Court, holding that commissions paid by a taxpayer for the sale of its own bonds were not deductible as ordinary and necessary expenses, said:

"In this respect the commissions do not differ from brokerage commissions paid upon the purchase or sale of property. The regulations have consistently treated such commissions, not as items of current expense but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax."

27 Does section 23 (r) require a modification of, or a departure from, the consistent treatment which has always been accorded to brokerage commissions paid upon the purchase or sale of speculative securities? We think not. The section merely places a limitation upon the deductions from gross income which may be taken as "losses from sales or exchanges" of noncapital assets by providing that they "shall be allowed only to the extent of the gains from such sales or exchanges."

Petitioner argues that if Congress had intended to include commissions within such losses, it would have made specific reference to them either in section 23 (r) or in section 23 (t). He refers to the familiar rule enunciated by the Supreme Court in Gould v. Gould, 245 U. S. 151, and oft applied by this Board, that tax levying statutes are not to be extended by implication and doubt is to be resolved in favor of the taxpayer. But the rule is not applicable here. Congress did not define "losses" and we must presume that the term was used in the section in question as it had been construed by the courts and by this Board. "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them." DeGanay v. Lederer, 250 U. S. 376.

But, says petitioner, unless the commissions are allowed as ordinary and necessary business expenses or as losses they will never be reflected against taxable income in any year. We do not agree with this contention. The effect of adding the commissions to the cost of the

28 stock purchased in 1932 and offsetting them against the selling price of the stock sold in that year was to increase the amount of the losses for that year. Under the provisions of section 23 (r) (2) losses, disallowed as a deduction by paragraph (1) of the same section, to an amount not in excess of the taxpayer's net income for the taxable year, were to be considered for the purpose of computing his income as losses sustained in the succeeding taxable year from sales or exchanges of stocks or bonds which were not capital assets. Such losses, under the construction of the Department, approved by the courts and by this Board, included the commissions. It is clear that if petitioner had sufficient gains from the sale of noncapital assets in 1933 to absorb the losses disallowed in 1932, he suffered no hardship by the treatment accorded to the commissions. The mere fact, if it is a fact, that he did not have sufficient gains in 1933 to enable him to so utilize all of the 1932 losses, does not justify overturning or setting aside the rule therefore consistently followed by the Department for the computation of such losses.

The regulation as amended in 1932 has not been considered by the courts or by this Board. So far as pertinent herein it reads:

"Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. [Art. 282, Regulations 77.]

The italicized portion was added in 1932.

29 Petitioner contends that the regulation as amended authorizes the deduction of the selling commissions from the gross income of a trader in securities as ordinary and necessary expenses of carrying on a trade or business. Having reached this conclusion he takes the next step and contends that if the selling commissions are deductible then no good reason exists for treating otherwise the buying commissions. But did the amendment to the regulations have such a far-reaching effect? We think not. A clue to what was intended by it may be gleaned from a memorandum of the general counsel of the Department issued about the time that it was made. Therein (G. C. M. 15430, XIV-2 C. B. 59) it is stated, in effect, that the Department had undertaken, by the amendment in question, to create an exception to the general rule, which was to be applicable only to dealers in securities. We need not decide whether such exception was valid or not, nor do we pass upon it. But we do decide that the amendment did not have the effect of making the brokerage commissions, paid by a trader in securities, deductible either as ordinary and necessary expenses of carrying on a trade or business or as losses.

It follows that the deficiency determined by the respondent should be, and it is, approved.

Reviewed by the Board.

Judgment will be entered under Rule 50.

SMITH and DISNEY concur only in the result.

Dissenting opinion

ARUNDELL, dissenting: I disagree on the last point—the treatment of brokers' commissions. In my opinion the majority report errs in failing to allow the commissions to be deducted as ordinary and necessary expenses.

The facts stipulated abundantly establish that the taxpayer's activities in buying and selling securities amounted to a trade or business. Being engaged in a trade or business, it would seem that his expenses would be deductible under that section of the statute which allows the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Sec. 23 (a). It is difficult to see why commissions, particularly selling commissions, are not ordinary and necessary expenses. They are a part of the cost of selling goods, treated as such generally in business, and are allowed by the Commissioner's regulations to dealers in securities as distinguished from traders in that class of goods without expressed reason for the distinction. The statute makes no such distinction.

Earlier decisions are pointed to as establishing that commissions are not treated as expenses. Under the statutes in force when those decisions were rendered it mattered little what designation was given to them as long as they went into the computation of gain or loss. The practice of treating buying commissions as part of the cost and selling commissions as a reduction of selling price was in the interest of simplification of accounting for gains or losses and was without direct statutory sanction. Now that statutes have been enacted under which the taxpayer, following the former practice, can not

deduct as sustained loss, it seems to me that he should be permitted to call his expenditures by their true name—expenses of trade or business—and bring them within the statutory provision directly dealing with such expenditures. It is to be noted that section 23 (r), which is applied by the majority report to this case, does not deal with expenses at all, and, if there is any conflict between it and section 23 (a), then it should give way to the section directly dealing with expenses.

It is not a sound answer to the taxpayer's argument to say to him that possibly he may have the benefit of his expenses in a future year on other sales or exchanges. The taxing statutes have consistently assessed income taxes on the basis of annual accounting periods (*Helvering v. Morgan's Inc.*, 293 U. S. 121) and in order to achieve this end it is necessary to account in each year for the profits or losses on the sale or exchange of all property dealt in within the

year. This requires that all profit on the property and all deductions allowed with respect to it be reported as occurring within the year. It is only when the deductions allowed for the year are exhausted that there is resort to the exception of carrying over to a succeeding year. Here, if we follow the plain wording of the statute and allow as expenses what are generally regarded as such, the taxpayer's operations within the year will be accounted for within that same year and thus meet the primary intent of Congress to levy taxes on an annual basis.

So far I have discussed mainly commissions of sales, for they are to my mind clearly business expenses. Commissions on purchases are a bit more difficult to classify, perhaps because we have fallen into the habit of speaking of them as "capital expenditures." Yet upon analysis they are little if any different from selling expenses. To one engaged in the business of buying and selling they are ordinary and necessary expenses. A merchant employing a buyer on salary would unquestionably deduct the salary as a current business expense rather than allocate it as part of the cost of goods, and in substance a commission paid to a buyer is no different.

LEECH, ARNOLD, and HARRON agree with this dissent.

BLACK agrees with this dissent insofar as it relates to selling commissions.

Before United States Board of Tax Appeals

[Title omitted.]

Motion to vacate decision of the Board

Filed April 5, 1937

Now comes the Petitioner in the above entitled cause, by his attorney Thomas M. Wilkins, Union Trust Building, Washington, D. C., and moves that the Board vacate its decision herein promulgated on March 31, 1937, and reconsider the issues therein involved.

The reasons for this motion are:

"(a) That the decision (pages 6 and 7 of the advance sheets) is predicated in substance upon a repealed statutory provision, namely, Section 23 (r) (2) of the Revenue Act of 1932 (quoted in full on page 3 of the Board's decision). Specifically the Board's decision advances and relies upon a wholly fallacious premise, namely that the stock losses disallowed as a deduction by paragraph (1) of Section 23 (r) may be allowed as a 'carry over' in computing petitioner's income in 1933 the succeeding taxable year under the provisions of Section 23 (r) (2) of the Act. This provision, which could not have become effective in any case until January 1, 1933, was expressly repealed effective as of January 1, 1933, by Section 218 (b) of the National Industrial Recovery Act.

34 (b) That the decision of the Circuit Court of Appeals in Davis v. United States, — Fed. (2d) — (January 4, 1937), relied upon by the Board in support of its view that Section 23 (r) is constitutional, is in conflict with decisions of the Supreme Court of the United States in the cases of Stewart Dry Goods Company v. Lewis, 294 U. S. 550, 558, and the United States Glue Company v. Town of Oak Creek, 247 U. S. 321, 328, which held that in order not to violate due process of law, graduated rates of taxation must be adjusted with reasonable approximation to the net earnings of the taxpayers. Petitioner therefore urges that Section 23 (r) of the act is unconstitutional in that it has the effect of destroying the reasonable ground for discrimination resulting from graduated normal taxes and surtaxes.

(c) That Constitutional questions if present in any case need not be pleaded nor even raised as the court or the Board may raise such questions of its own motion. Weems v. United States, 217 U. S. 349, 362.

Respectfully submitted.

(Signed) Thomas M. Wilkins,
THOMAS M. WILKINS,
Attorney for Petitioner.

Union Trust Building, Washington, D. C."

35 Before United States Board of Tax Appeals

[Title omitted.]

Motion for rehearing

Filed April 20, 1937

Now comes the Petitioner in the above entitled cause, by his attorney, Thomas M. Wilkins, Union Trust Building, Washington, D. C., and moves that the Board grant a rehearing in the above case and reconsider its opinion of March 31, 1937.

The reasons for this motion are set forth in the attached brief.

Respectfully submitted,

(Signed) Thomas M. Wilkins,
THOMAS M. WILKINS,
Attorney for Petitioner,
Union Trust Building, Washington, D. C.

[Title omitted.]

Brief in support of motion for rehearing and reconsideration of opinion

Filed April 20, 1937

1

Compensation paid brokers for services rendered in connection with the purchase and sale of stocks in the course of the ordinary and necessary operations of a taxpayer's trade or business are deductible under section 23 (a)

Section 23 (a) of the Revenue Act of 1932 provides that there shall be deducted in computing net income, the ordinary and necessary expenses of carrying on any trade or business "including a reasonable allowance for salaries, or other compensation for personal services actually rendered * * *"

"It is clear that the evidence in this case abundantly establishes that this taxpayer

37 "in dealing on the stock exchange to the extent he was during the taxable year, was carrying on a trade or business within the meaning of the statute." L. T. Alverson, 35 B. T. A. 482, 488.

The record also shows clearly that he expended during the said year "for personal services actually rendered" to him during the said year, "compensation" in the form of commissions in the amount of \$18,888, which the Board has disallowed.

The Board of Tax Appeals in its majority opinion rendered in this case on March 31, 1937, refused to allow as deductions, the said "compensation" paid by Mr. Winmill during 1932 in carrying on his trade or business of buying and selling stocks. It cites the regulations having to do with the cost of capital assets purchased not in connection with a trade or business, and wholly ignores Article 121 of Regulation 77, which provides in part that "among the items included in business expenses are * * * commissions, * * *" etc.

In no case which has come to the attention of petitioner's counsel involving commissions on stocks purchased in the course of the operation of a trade or business have the regulations cited by the Board ever been applied by any court or by the Board of Tax Appeals.

Each of the cases cited by the Board in support of its majority opinion quite obviously relates to a strictly capital or casual matter and in no instance whatsoever to commissions paid on the purchase or sale of stocks bought and sold in the operation of a trade or business.

38 Specifically in the case of E. P. Greenwood, 34 B. T. A. 1209, the Board held expressly that Greenwood was not engaged in a trade or business; that the stock sales in issue were mere

casual sales and the Board disallowed the commissions in the year paid specifically on these grounds alone.

In the case of Florence G. Baldwin, 23 B. T. A. 512, the petitioner was not in the business of dealing in securities and therefore it was held that the commissions paid were not ordinary and necessary business expenses. The commissions were allowed by the Board in the year of the sale.

In the case of I. N. Burman, 23 B. T. A. 639, the commissions involved were commissions on casual purchases of real estate which was not sold during the taxable year. The Board in that case relied solely upon the decision in *Hutton v. Commissioner*, 39 Fed. (2d) 459.

In the case of Frank Cavanaugh, 19 B. T. A. 1251, the commissions involved were also real estate commissions on casual sale of real estate by a person who was not engaged in the purchase and sale of real estate as a business.

In the case of *Hutton v. Commissioner*, 39 Fed. (2d) 459; *supra*, the stocks casually purchased by Mrs. Hutton were not sold during the year, nor were they purchased as part of the operation of a trade or business carried on by her.

In the case of *Helvering v. Union Pacific Railroad Company*, 293 U. S. 282, the issue involved the deduction of commissions on bonds issued by the taxpayer itself. Each of the cases cited in the margin by the Supreme Court of the United States in support of its tacit approval of the regulations providing for the capitalization of commissions, involved a commission paid on a clearly capital transaction such as a commission on the sale of capital stock being originally issued by the corporation taxpayer.

In its decision the Supreme Court pointed out, as did the Circuit Court of Appeals in the *Hutton* case, that the taxpayer suffered no hardship by such a rule and that the commission would eventually be reflected against income when the securities were eventually retired or sold. The same lack of hardship is obvious in every single case relied upon by the Board. In none of these cases could the provision of prior law corresponding to Section 23 (a) have been applicable.

Neither these cases nor the regulations have any application to the case of commissions expended by one carrying on the trade or business of buying and selling securities.

Even if we assume that the regulations and the decisions cited by the Board under laws prior to the 1932 act clearly prevented the deduction of commissions paid for services rendered in connection with the purchase and sale of securities in the course of the operation of a trade or business, these regulations and decisions are not applicable under the 1932 law, because of the fundamental change effected by Section 23 (r) (1).

It is true that legislative re-enactment of a statute without change operates as an implied legislative approval of the construction given to the statute before re-enactment, but where, as in the instant case,

the statute is re-enacted with a substantial change which eliminates the application of a uniformly expressed ground for the previous construction, such previous construction cannot apply to the subsequent dissimilar enactment.

In *DeGaney v. Lederer*, 239 Fed. 568, 571, affirmed by the Supreme Court of the United States in 250 U. S. 376, the lower court said:

"Legislative constructions of prior acts have all the value of expressions of opinion by those to whose opinions weight and importance is attached. Inasmuch, however, as such an opinion is that of an autocrat who can impose his will by changing the law, the distinction must always be observed between an opinion of what the law has been and a new enactment. If such subsequent statute gives to the prior one a meaning different from its sound meaning as judicially construed, the later statute is a new enactment, no matter what its form."

See "Statutes" 59 Corpus Juris 1063 and 1064 indicating clearly that where the old and new statutes are essentially dissimilar the rule that the construction placed on a former statute by the courts is impliedly adopted by the legislature when it re-enacts such statute or enacts analogous legislation, does not apply.

Inasmuch as the regulations and decisions relied upon by the Board in support of its majority opinion all clearly contemplate the eventual allowance against income of the commissions paid in connection with capital purchases and sales, and as the higher court decisions cited predicate their holding on the premise of eventual allowance against income, the said regulations and decisions are not authority to completely and forever disallow this compensation paid in the operation of a trade or business contrary to the plain language of section 23 (a).

In this regard the quotation by the majority opinion of the Board from the decision of the U. S. Supreme Court in the case of *DeGaney v. Lederer* (supra), is quite appropriate:

"Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them."

The words "compensation for personal services" as used in section 23 (a) of the Revenue Act of 1932 are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. In that sense and with that commonly attributable meaning, these words include compensation in the form of broker's commissions and when such compensation is paid in connection with the purchase and sale of stocks bought and sold in the course of the ordinary and necessary operations of a taxpayers' trade or business, the statute requires that said compensation for services actually rendered shall be allowed as a deduction in computing income.

Prior to the opinion of the Board in the Winmill case there was no authority to the contrary by the Board or any court.

The Board in its majority opinion contends that the cases cited by it are applicable to the case of this taxpayer because he "suffers no

42 hardship by the ruling adopted by it as to commissions." The Board relies upon the carry over provisions of section 23 (r) (2) of the Revenue Act of 1932 as authority for that view. However, this argument which is indispensable to the application of the decisions cited and to the Board's majority opinion is completely refuted by the fact that the carry over provisions of Section 23 (r) (2) of the act never went into effect because they were repealed by the National Industrial Recovery Act as of January 1, 1933—the first day on which these provisions ever could have been made effective. It is therefore definitely not a fact, as stated by the Board, that he "suffered no hardship by the ruling adopted by it as to commissions."

II

Section 23 (r) (1) is invalid because, if upheld, results in a tax at progressive rates on gross income. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550

With respect to the argument that the provisions of Section 23 (r) are unconstitutional in that they violate the due process clause of the Fifth Amendment to the Constitution, it is believed that the Board did not have brought to its attention the decisions of the Supreme Court of the United States in *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 and *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, which decisions are clearly inconsistent with the decision of the Circuit Court of Appeals in *Davis v. U. S.*, 87 Fed. (2d), 323, relied upon in support of the majority opinion of the Board.

43 The provisions of Section 23 (r) (1) have the effect of applying the progressive rates of income tax without relation to the taxpayer's ability to pay. This circumstance destroys the reasonable basis for the discrimination otherwise inherent in the progressive income tax rate schedule. The only constitutional justification for the application of a graduated scale of rates in income taxation is the superior ability to pay of those upon whom the higher rates are imposed. Graduated rates must bear a reasonable relation to the current increase in net worth of the taxpayer resulting from transactions completed during the taxable year.

Losses of a taxpayer which occur in his trade or business reduce his net worth. They are definitely related to his taxable profits from other activities for the same year (a) as to the purpose to make a profit, (b) as to the taxable year involved and (c) as to the taxable person. Such losses must, therefore, be taken into account in applying a schedule of graduated rates based on ability to pay. Mr. Winmill had an actual loss of \$135,000 during the taxable year, yet under the statute he must pay a tax on that loss as though he had a net income of \$35,000.

The general principles governing this phase of the case were clearly stated by the Supreme Court in the case of *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 558, in which the Court said:

"The district court found that 'generally speaking' he who sells more is in receipt of a greater profit and hence has larger ability to pay, and upon this basis justified the classification. But it is to be remembered that the act in question taxes gross sales and not net income. As stated in *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 328:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

"The proofs submitted are insufficient to support the appellees' contention that the graduation of the tax was adjusted with reasonable approximation to the net earnings of the taxpayers."

"An income levy by its very nature assures equality of treatment, because the burden of the exaction varies with increase or decrease of return on capital invested and with the comparative success or failure of the enterprise."

"As we have said, the statute does not purport to levy a tax on incomes. Plainly it does not in fact do so. A merchant having a gross business of \$1,000,000, but a net loss, must pay a greater tax than one who has a gross of \$400,000 and realizes a substantial net profit."

"The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege, the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other."

"We hold the act unconstitutional."

It is therefore respectfully submitted that Section 23 (r) is unconstitutional because it results in a graduated tax on gross income

and thus discriminates between persons wholly without substantial reason based upon differences which bear no reasonable and just relation to the matter in respect of which the classification is proposed.

46 It is respectfully prayed that the Board reconsider its opinion of March 31, 1937, and determine that there is no deficiency against this taxpayer for the year 1932.

THOMAS M. WILKINS,
Attorney for Petitioner,
Union Trust Building, Washington, D. C.

Before United States Board of Tax Appeals.

Docket No. 79,036

ROBERT C. WINMILL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to findings of fact and opinion herein promulgated March 31, 1937, directing that the deficiency be determined and decision entered under Rule 50, respondent on April 28, 1937, filed a proposed determination of deficiency and notice thereof, which were duly served upon petitioner; and petitioner having filed, on April 30, 1937, notice of acquiescence to said proposed determination, it is

Ordered and decided that there is a deficiency in income tax herein for the year 1932 in the amount of \$5,508.14.

(Signed) ARTHUR J. MELLOTT, Member.

Enter:

Entered May 3, 1937.

47 In United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

Petition for review

Filed July 6, 1937

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Robert C. Winmill by his Attorney, Thomas M. Wilkins, Union Trust Building, Washington, D. C., and in support of this his petition filed in pursuance of the provisions of section 1001 of the Revenue Act of 1926 as amended, for the review of the decision of the United States Board of Tax Appeals rendered on May 3, 1937, redetermining as to this petitioner, Robert C. Winmill, that there is

a deficiency in income tax for the year 1932 in the amount of \$5,508.14 respectfully shows to this Honorable Court as follows:

I. DESIGNATION OF COURT OF REVIEW

The petitioner on review is an individual with his place of
48 business at One Wall Street, New York, New York. On or about March 15, 1933, this petitioner filed a Federal income tax return for the calendar year 1932 with the Collector of Internal Revenue for the Second District of New York, with offices located in New York City, and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The petitioner being aggrieved by the findings of fact, opinion, decision and order of the United States Board of Tax Appeals in the above-entitled case, and the Collector's Office, to which was made the return of the income tax in respect of which the liability in controversy arises, being located within the Second Judicial Circuit; the petitioner desires a review of said findings of fact, opinion, decision and order, in accordance with the provisions of the Revenue Act of 1926, as amended, by the United States Circuit Court of Appeals for the Second Circuit.

II. PRIOR PROCEEDINGS

The Commissioner of Internal Revenue determined a deficiency in income tax against said petitioner in the amount of \$5,508.14 for the calendar year 1932, and on January 14, 1935, sent to the said petitioner by registered mail, a notice of the said determination of income tax deficiency as provided in Title III of the Revenue Act of 1926 as amended. Subsequently, on April 10, 1935, the petitioner filed with the United States Board of Tax Appeals a petition appealing from the said determining contesting the entire amount of the said
deficiency determined by the Commissioner as aforesaid. On
49 April 27, 1935, the Commissioner filed an answer to the petition admitting the jurisdictional facts set forth in the petition, but entering a general denial as to facts set forth in support of the petitioner's contention that there was no deficiency in income tax for the said calendar year 1932.

On September 9, 1935, the Board served notice upon the parties that the proceeding had been set down for hearing before the Board in Washington on October 28, 1935.

On October 16, 1935, the petitioner filed a motion with the Board requesting that the case be set down for hearing in the vicinity of New York City. Under date of October 18, 1935, the said motion was granted by the Chairman of the Board and the case was set down for hearing in New York City and was heard by the Board on May 12, 1936.

On March 31, 1937, the Board promulgated its opinion and on May 3, 1937, entered its final decision wherein it was ordered and decided

that there was a deficiency in Federal income tax against said petitioner for the calendar year 1932 in the amount of \$5,508.14.

III. NATURE OF THE CONTROVERSY

Petitioner, a member of a partnership engaged in the stock brokerage business, operated three securities trading accounts as an individual and also operated four accounts jointly with others. During the taxable year he reported a gain from his partnership interest and from the operation of the joint accounts and a large loss from the operation of his individual accounts. All of the securities sold were non-capital assets. In computing the amount of the loss and gain on these accounts, buying commissions were included as part of the cost and selling commissions as an off-set against the selling price.

The petitioner contended before the Board.

(a) That there should be no deficiency, because section 23 (r) of the Revenue Act of 1932, under which the Commissioner disallowed the stock losses claimed as a deduction on petitioner's return, is unconstitutional and void, under Article I, section 2, clause 3 and section 9, clause 4, (1) because it levies a direct, unapportioned tax upon subject matter not contemplated by the word "incomes" within the meaning of the Sixteenth Amendment to the Constitution, (2) because said section 23 (r) of the Revenue Act of 1932 is unconstitutional and void under the due process clause of the Fifth Amendment in that it causes the tax imposed by the Act to unreasonably discriminate between taxpayers selling stocks and bonds and taxpayers selling other property held less than two years, and (3) that the said section 23 (r) is unconstitutional and invalid under the Fifth Amendment, because if upheld it results in imposing a tax on gross income at progressive rates of surtax, without reference to the ability to pay.

(b) That even if the statute is constitutional, the brokers' commissions in the total amount of \$19,028.75, which the petitioner was required to pay in connection with the purchase and sale of the 61,992 shares of stock sold by him during the year 1932, represented ordinary and necessary expenses paid by the petitioner in the course of the trade or business carried on by him in pursuance of which the said 61,992 shares of stock were purchased and sold by him during the year 1932.

(c) That there is no authority under the law for increasing the petitioner's income for the year 1932 by an amount equal to the stock profits on joint accounts of \$2,247.65 by refusing to allow as a deduction an equal amount of losses from sales of stocks and bonds by petitioner.

IV ASSIGNMENT OF ERRORS

Your petitioner says that in the record and proceedings of the United States Board of Tax Appeals in the above-entitled cause and in the final order entered therein there is manifest error, and for error the petitioner assigns the following:

(1) The Board erred in holding that there is a deficiency for the calendar year 1932 in the amount of \$5,508.14 or any other amount.

(2) The Board erred in holding the provisions of the Revenue Act of 1932 and particularly 23 (r) thereof, to be constitutional.

(3) The Board erred in refusing to allow as a deduction buying and selling commissions paid by the petitioner during the calendar year 1932, in the total amount of \$19,028.75 in buying and selling shares of stock during the said year 1932 in carrying on his trade or business of operating three separate security trading accounts, the entire interest in each of which was his own, and his four joint accounts in which others had a half interest.

(4) The Board erred in disallowing brokers purchase or buying commissions paid on the purchase of the said 61,992 shares of stock sold during the year 1932 in the amount of \$9,181.00.

(5) The Board erred in disallowing brokers selling commissions in the amount of \$9,574.00, paid during 1932 on the sale of the said 61,992 shares of stock sold during the year 1932.

(6) The Board erred in not holding that the operation by petitioner during 1932 of the said three separate security trading accounts, the entire interest in each of which belonged to the petitioner, was a "trade or business" within the meaning of those words as used in section 23 (a) of the Revenue Act of 1932.

(7) The Board erred in not holding that the operation by petitioner during 1932 of each of his four joint security trading accounts, a half interest in each of which belonged to others, was a "trade or business" within the meaning of those words as used in section 23 (a) of the Revenue Act of 1932.

(8) The Board erred in not allowing as a deduction under section 23(e) of the Revenue Act of 1932, losses in the amount of \$155,989.92 from sales of stocks and bonds held by petitioner for less than two years in the three separate trading accounts, the entire interest in each of which was his own.

(9) The Board erred in not allowing as a deduction under section 23 (e) of the Revenue Act of 1932, losses from sales of stocks and bonds held for less than two years in the three separate trading accounts operated by the petitioner during 1932, the entire interest in each of which was his own, to the extent of \$2,247.65, or an amount equal to the petitioner's stock profits in his joint accounts.

(10) The Board erred in increasing petitioner's income by \$2,247.65 on the basis of its holding in effect that regardless of the provisions of section 23 (r) of the Revenue Act of 1932, losses from sales of stocks and bonds held by petitioner for less than two years individually may not be allowed to the extent of the petitioner's share

in the gain from sales of stocks and bonds held jointly for less than two years.

PRAYER

Your petitioner therefore prays for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the United States Board of Tax Appeals in the above-entitled case, in accordance with the act of Congress in such cases made and provided, and that the Clerk of the said Board be directed to transmit and deliver to the Clerk of the said Court certified copies of all and every of the documents listed and set forth in the rules adopted by the United States Circuit Court of Appeals for the Second Circuit providing for the presentation of petitions for review of decisions of the United States Board of Tax Appeals.

54 And your petitioner will ever pray.

(Signed) Thomas M. Wilkins,
THOMAS M. WILKINS,
Counsel for Petitioner,
Union Trust Building, Washington, D. C.

[Duly sworn to by Thomas M. Wilkins; jurat omitted in printing.]

55 In United States Circuit Court of Appeals, for the Second Circuit

* Proof of service

Filed July 6, 1937

[Title omitted.]

To MORRISON SHAFROTH,

Chief Counsel, Bureau of Internal Revenue:

Please take notice that the petitioner on review on the 6th day of July 1937, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you. Dated at Washington, D. C., this 6th day of July 1937.

(Signed) Thomas M. Wilkins,
THOMAS M. WILKINS,
Counsel for Petitioner on Review,
Union Trust Building, Washington, D. C.

56 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, as acknowledged this 6th day of July 1937.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket No. 79,036

ROBERT C. WINMILL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of Evidence

Filed July 15, 1937.

This cause came on to be heard before the United States Board of Tax Appeals on May 12, 1936, at New York, New York, the Honorable Arthur J. Mellott, Member of the United States Board of Tax Appeals presiding. Thomas M. Wilkins, Esq., appeared on behalf of petitioner and John H. Pigg, Esq., appeared on behalf of the Commissioner. The following is a narrative statement of the evidence to the Board.

57. The petitioner conceded in open court that the income of the Gude, Winmill partnership was derived solely and exclusively from commissions from the sale of stock or interest or both.

ROBERT C. WINMILL, called as a witness by and on behalf of the petitioner, having been first duly sworn, testified on direct examination as follows:

My business is that of stock broker in the firm of Gude, Winmill and Company. During 1932 I was a partner in that firm and I traded considerably for my own account, bought and sold securities. During 1932 I traded to a considerable extent for my own account. I spent a considerable amount of my time on the trading. To elaborate on the answer, I had seven partners, the business was very dull then, and I traded a great deal for myself. In trading during that year, I had some joint accounts with others. As to the nature of those joint accounts, there were no contracts. We had some trades with others, jointly with them, and we shared the profits and losses together. They didn't amount to a great deal, but the figures show there, I ran them, and handled the business of the accounts. I gave the orders in both cases. As to the discretion used in giving those orders, it was my discretion, I don't know whether in every case it was entirely my discretion, it was four years ago. I do not remember whether or not I was influenced at all by the person with

58. whom I was engaged in this joint venture in every case, it was four years ago. In my own personal account I was not influenced by anyone.

Cross examination of Mr. WINMILL:

As a member of the partnership of Gude, Winmill and Company during the year 1932 I was at the office and I devoted a great deal of my time to my own business, because, you see, a great deal of my own time was spent in the partnership business, but not as much as I spent in my own business. My partnership was a stock brokerage firm which bought and sold for customers only, purely a commission

house for customers for a commission. To some extent, as a member of the partnership or as an officer of the organization, I saw customers and made and handled transactions for them as a member of the partnership. This was done to some extent during 1932, as you know, was a very bad year, our income was very low and business was very, very bad. It would be very hard to state approximately how much of my time was spent during 1932 as a member of the partnership receiving orders and taking orders for the purchase and sale of stock for customers. There weren't so many orders, that is the unfortunate part of it, business was very, very slow, we ran in the red to a great extent during the year. I spent a great deal of my time, I regret to say, in my own trading. It didn't prove very profitable. The records would show much better than I can tell whether the 419 sales of stock effected by me during 1932, occurred in a short period of time or whether they were more or less continuous throughout the year, I couldn't positively say. I devoted a great deal of my time to these individual stock transactions, but I can't say definitely how much time I devoted to them. I was absent from New York City at sometime during the year 1932, as to how long I would have to look that up. I generally go away every year for a while, I don't recall 1932. I did go abroad during the year 1932. I don't remember just exactly how long I was absent from the United States during that year. I know we rented our place down on Long Island, and I was away part of that summer. I frequently spend a little of my time in Warrenton, Virginia. I don't know about how much each year. We have an office down there, a branch office, and when I am down there I go to the office. I imagine every day I am down there, I do that, but we have had a branch down there for ten years or more. I mean a branch office of the partnership of Gude, Winmill and Company in Warrenton. So I can go in there and do any trading I have down there, or here. I handled through the branch office of the partnership, of which I am a member. All my business was done through Gude, Winmill and Company. I didn't maintain any individual office down there in which I carried on my own business with respect to these individual transactions. I had a desk down there, and a room in this building in which our office was located, of my own. I think it was a part of the partnership office, I imagine it was in the office, yes. I didn't pay the rent personally, I don't think so. I stated that I gave the order for the sale of the stock with these four joint trading accounts described in the stipulation of facts. As to what consultation I had with the other persons associated with me or interested in those accounts, it might have come up in any way. We might have talked together and decided to do something. Whatever was done, I don't remember just the facts. One was with a fellow named Dick Height, that is dead now, and he used to come down to Warrenton once in a while and we used to see him once in a while and we had some joint accounts, we traded a little bit. I don't know just what the conversations were, they were speculations just the same as my own speculations in every way.

I was speculating with my money and my money was used in every joint account; I think, to carry the account, not the capital of the firm, but some individual money I had, the office was used for trading. As to whether or not the other persons with whom I was interested in these various accounts put their money into it to purchase certain shares of stock, I don't believe Dick Height, for instance (we had some accounts), I don't believe he ever spent any money, I don't believe he sent any money to the office; I margined the thing myself and ran the thing, and handled it and gave him half the profits. As to whether or not there was any agreement between us, and as to what the responsibility of the other person would be in the event of unfavorable outcome, he would take half the profit or the loss, just as the case might be. It was not very extensive, just little things, I mean we might start anything, they were very mild little trade, all of them, you can see they were nothing compared with my own. I do not mean to testify that I gave him half the profits that arose from that account. He had a half interest in the account. He had a half responsibility and half the profit and half the losses, in every case, and they were all men of responsibility.

Redirect examination of Mr. WINMILL:

My office in Virginia was kept open all during the year. I don't think it has ever been closed since it was opened. It was opened about ten years ago, I think. In these transactions, these stock transactions, the joint transactions and my own individual transactions, the primary purpose of entering into them was to make money, profit.

The foregoing condensed statement of the evidence is hereby approved to be incorporated in the record on the petition for review, this 15th day of July, 1937.

(Signed) Thomas M. Wilkins,
THOMAS M. WILKINS,

Union Trust Building, Washington, D. C.,
Attorney for the Petitioner.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,

Chief Counsel,
Bureau of Internal Revenue, Washington, D. C.,
Attorney for Respondent.

Approved and ordered filed this 15th day of July, 1937.

(Signed) Arthur J. Mellott,
ARTHUR J. MELLOTT,
Member, U. S. Board of Tax Appeals.

In re: Robert C. Winmill, Docket No. 79,036

The following schedule shows the result of the operations of the three stock trading accounts which were operated by the petitioner for his own account:

Cost of stock sold in 1932 through three individual accounts	\$2,883,773.95
Premiums paid on individual accounts, 1932	395.51
Premiums paid on individual accounts, 1932	361.68

Cost plus premiums on stock sold in 1932 on three individual accounts \$2,884,531.14

Selling price of 61,992 shares sold through three individual accounts	\$2,719,760.60
Premiums received on sales through three accounts	1,929.67
Premiums received on sales through three accounts	1,214.01

Selling price, plus premiums received on sales through three accounts \$2,722,904.37

Cost as indicated above	\$2,884,531.14
Selling price as indicated above	2,722,904.37

Loss on sales through three individual accounts, including tax but not including commissions	\$ 161,626.77
63 Buying commissions on stock sold in 1932, through three individual accounts	8,911.00
Selling commissions on stock sold in 1932, through three individual accounts	9,574.00

Loss on sales through three individual accounts, including tax and commissions	\$180,111.77
Tax paid in 1932 on 1932 sales through three individual accounts	5,072.95

Loss on sales through three individual accounts, including commissions but not tax (taxes claimed and allowed as deductions)	\$175,038.82
Gain on sales through four joint stock trading accounts attributable to petitioner's interest	2,267.80

Net loss claimed on 1932 return on account of three individual accounts and four joint-stock trading accounts \$172,771.02

The following schedule shows the petitioner's share of the result of the operations of the four joint stock trading accounts in which the petitioner had an interest, and which accounts were operated as joint ventures:

64 Cost of stock plus buying commissions	\$68,570.00
Buying commissions	270.00
Net cost of stock	\$68,800.00
Cost of calls	509.50
Cost of stock plus calls	\$68,809.50
Selling price less commissions and taxes	\$71,347.30
Selling commissions	273.75
Taxes on sales	66.83
Total selling price including commissions and taxes	\$71,687.68
Cost of stock plus calls as indicated above	68,809.50
Gross profit on sales	\$2,878.38
Less: Taxes	\$66.83
Commissions	543.75
	610.58
Net gain on sales enc 5/12/36	\$2,267.80

65

[illegible]

[Title omitted.]

Praeceptum for transcript of record

Filed July 15, 1937

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, a certified transcript of the record on appeal and include therein, the following:

- (1) Docket entries of proceedings before the Board.
- (2) Pleadings before the Board as follows:
 - (a) Petition for redetermination filed April 10, 1935, including annexed copy of deficiency letter dated January 14, 1935.
 - (b) Respondent's answer to amended petition filed April 27, 1935.
- 68 (3) Opinion of the Board promulgated March 31, 1937, together with Mr. Arundal's descending opinion.
- (4) Motion to vacate decision of the Board filed April 5, 1937, and denied April 12, 1937.
- (5) Motion for re-hearing filed April 20, 1937, denied April 26, 1937.
- (6) Decision of the Board entered May 3, 1937.
- (7) Statement of evidence settled or agreed upon together with the following exhibits:
 - (a) Joint Exhibit A-1 showing in detail the result of the operations of seven trading accounts.
 - (b) Respondent's Exhibit A, individual income tax return for the calendar year 1932 of this petitioner.
- (8) Petition for review filed July 6, 1937, together with proof of service of notice of filing petition for review, and service of copy of petition for review, dated July 6, 1937.
- (9) This praecipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Signed) Thomas M. Wilkins,
THOMAS M. WILKINS
Attorney for Robert C. Winmill.

July 15, 1937.

69 [Clerk's certificate to foregoing transcript omitted in printing.]

In United States Circuit Court of Appeals for the
Second Circuit

No. 72—October Term, 1937

Argued Nov. 17, 1937. Decided Dec. 6, 1937

ROBERT C. WINMILL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the Board of Tax Appeals

Before MANTON, L. HAND, and SWAN, Circuit Judges.

Petition to revise decision of the Board of Tax Appeals (35 B. T. A. 804). Decision reversed and remanded.

Thomas M. Wilkins, of Washington, D. C., for petitioner.

James W. Morris, Asst. Atty. Gen., and Sewall Key and Helen R. Carloss, Sp. Assts. to Atty. Gen., for respondent.

Opinion

MANTON, Circuit Judge.

Petitioner seeks a review of an income tax deficiency, charged against him for 1932. For several years prior to and during 1932, he was a member of a partnership engaged in the stock brokerage business. During 1932 petitioner ran three separate securities trading accounts which were his own. These operations involved 419 separate sales of 61,992 shares which had been acquired in 353 separate purchases. The cost of these shares was \$2,884,531.14, exclusive of purchase commissions amounting to \$8,911. Of this \$8,911, \$7,493.50 was paid in 1932 and \$1,417.50 in 1931. On the sale of these shares, the return to him was \$2,722,904.37, representing a loss. In 1932 he paid brokerage commissions of \$9,574 on said sales. During 1932 petitioner also operated four other security trading accounts in each of which he had an interest. These were joint ventures with another person who shared in the profits or losses as they might occur. Petitioner, however, furnished all the capital needed in the operation of these four accounts. During the year there were sold, through these four accounts, 2,525 shares of stock in 22 separate sales transactions. These 2,525 shares had been acquired in 22 separate purchases. Petitioner's share in the cost of this stock was \$68,300. The buying commissions paid by him in 1932 amounted to \$270. Petitioner's share of the proceeds of stock sold through the four accounts was \$71,687.88, and petitioner's share of the selling commissions paid during 1932 was \$273.75. His share of the profits made in these four joint accounts during 1932 was \$2,267.80 after payment of all costs and expenses. All shares sold through each of these seven accounts had been held less than two years, and hence were "non-

capital" assets under the 1932 Revenue Act (47 Stat. 192, § 101 (e) (8), 26 U. S. C. A. § 101 note). In his 1932 return, petitioner claimed the right to offset his share of the profits arising from the operation of the four accounts against the losses resulting from the three accounts and show a loss deductible from ordinary income. The Commissioner disallowed the deductions claimed on the petitioner's return and increased his income for the year 1932 by \$2,267.80, the sum of the stock profit on the joint accounts, plus \$172,771.02, which represented the stock losses in the three accounts. This resulted in the additional tax. No part of the broker's commissions referred to have been allowed by the Commissioner as deduction. The petitioner kept his books and made his return for the year 1932 on a cash receipt and disbursement basis.

It is contended on this petition to review that section 23 (r) (1) of the Revenue Act of 1932, 26 U. S. C. A. § 23 note,² dealing with deductible losses from the sale of "non-capital" assets, permits him to include among his own "non-capital" gains his share of the joint venture's "non-capital" gains, where, as here, another party agreed with him, without furnishing any capital, to share equally with petitioner in the profits and losses resulting from such transactions as the joint venture might conduct. He also contends that, if section 23 (r) (1) of the Revenue Act of 1932 limits the deductibility of losses resulting from sales of stocks or bonds (which are "non-capital" assets) to gains from such sales during the taxable year, it is unconstitutional and void. Petitioner contends further that the buying and selling commissions paid were a necessary incident to the conduct of his business—trading in the market—and that, pursuant to section 23 (a) of the Revenue Act of 1932, 26 U. S. C. A. § 23 (a) and note,³ he should be allowed these as deductions, even though such operations resulted in a loss and even though the losses from sales of "non-capital" assets are limited by section 23 (r) of the act, 26 U. S. C. A. § 23 note, to the gains from similar transactions.

The facts were stipulated, but the petitioner also testified that he devoted a portion of his time to the operation of these seven trading accounts.

Section 23 (r) places a limitation upon the deduction of losses. Congress has the power to condition, limit, or deny deductions from gross income in order to arrive at the net to be taxed. *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301, 51 S. Ct. 418, 75 L. Ed. 1049; *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 36 S. Ct. 278, 60 L. Ed. 546; *Helvering v. Independent Life Ins. Co.*, 292 U. S. 371, 54 S. Ct. 758, 78 L. Ed. 1311. We held this provision of the statute constitutional in *Davis v. United States* (C. C. A.) 87 F. 2d 323. The petitioner may not offset his gains from the four joint accounts by his losses on the three accounts which he operated individually.

² (r) Limitation on Stock Losses.

(1) Losses from sales or exchanges of stocks and bonds which are not capital assets shall be allowed only to the extent of the gains from such sales or exchanges.

³ (a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered.

Section 1111 (a) (3) of the Revenue Act of 1932, 26 U. S. C. A. § 1606 (2), defines "partnership" as including a "syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act [title] a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group," etc. Assuming that the petitioner and his associates in the joint ventures were not partners as generally accepted, they were nevertheless engaged in a "joint venture" in conducting these accounts and in dividing the profits and losses. For taxing purposes they must be considered as a "partnership." *Johnston v. Com'r*, 86 F. 2d 732 (C. C. A. 2). Accordingly, the Commissioner correctly ruled that the set-off could not be made.

Section 23 (a) of the 1932 Act (26 U. S. C. A. § 23 (a) and note) provides that there shall be deducted in computing net income, the ordinary necessary expenses of carrying on a trade or business "including * * * compensation for personal services actually rendered." The volume of sales and the amounts thereof and the time consumed in carrying on these operations would justify the Board of Tax Appeals in finding (they made no such finding) that the petitioner carried on these operations as a trade or business. During the year he expended "for personal services actually rendered to him" compensation in the form of commissions in the amount of \$17,067.50 which the Board has disallowed. In such disallowance, the Board based its holding upon regulations having to do with "non-capital" assets not purchased in connection with a trade or business. Article 121 of the Treasury Regulations 77 provides in part that "among the items included in business expenses are * * * commissions. * * *" The allowance of commissions on real estate sales as business expenses has been approved by the Board. *The Highlands, Trust No. 1546 v. Com'r*, 32 B. T. A. 760. See, also, *Alexander Sprunt & Sons v. Com'r* (C. C. A.) 64 F. 2d 424; *Kornhauser v. U. S.*, 276 U. S. 145, 48 S. Ct. 219, 72 L. Ed. 505; *Whitman v. Com'r*, 16 B. T. A. 197, affirmed (C. C. A.) 49 F. 2d 1087. The same principle should be equally applicable to one whose trade and business involves the purchase and sale of stocks for profit.

Article 282 of Treasury Regulations 77 provides that commissions paid in purchasing securities are a part of the cost price of such securities while commissions paid in selling securities when such commissions are not an ordinary and necessary expense of carrying on a business are an offset against the selling price. If the petitioner's activities in buying and selling amounted to a trade or business, his expenses would be deductible under section 23 (a), 26 U. S. C. A. § 23 (a) and note, which allows "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." This would apply to commissions paid in buying and selling securities. No good reason is advanced for a discrimination against dealers in securities. The statute makes no such discrimination. The regulations and decisions which controlled the Board

in support of the majority opinion contemplate the eventual allowance against income of the commissions paid on purchases and sales not connected with a business.

The questions presented in *Helvering v. Union Pacific Ry. Co.*, 293 U. S. 282, 55 S. Ct. 145, 79 L. Ed. 363, dealt with deductions of commissions on bonds issued by the taxpayer itself. The court there approved the regulation providing for the capitalization of the commissions involved. The taxpayer suffered no hardship by such a rule, as was pointed out in *Hutton v. Com's*, 39 F. 2d 459 (C. C. A. 5), since, under the Revenue Acts then in force, the commissions would be reflected against income when the securities were eventually sold. But under the 1932 Revenue Act, due to section 23 (r), 26 U. S. C. A. § 23 note, the commissions paid would not be reflected against gross income unless the sale of the securities resulted in a profit.

Section 23 (r), 26 U. S. C. A. § 23 note, does not deal with expenses at all, and there is no conflict between it and section 23 (a), 26 U. S. C. A. § 23 (a) and note. Nor may it be said that there is a possibility that the petitioner would have the benefit of his expenses in a future year on other sales or exchanges. Taxing statutes consistently assess income taxes on the basis of annual accounting periods. If the commissions be regarded as an expense of a trade or business, the petitioner's operations within the year will be accounted for within that same year, and this meets the intent of Congress to levy taxes on an annual basis. If a merchant employed a buyer, his salary would be deductible as a current expense and would not be allocated as part of the cost of the goods. If the merchant paid a commission instead of a salary, it would likewise be a necessary expenditure of the business. So, too, the commissions paid in the purchase and sale of securities are an expenditure of carrying on that business.

The decision is reversed and the cause remanded for the Board to make a finding as to whether or not the petitioner, in 1932, was a trader in the business of buying and selling securities. If so, the commissions for purchases and sales are deductible.

73 In United States Circuit Court of Appeals, Second Circuit

ROBERT C. WINMILL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed December 13, 1937

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the ——— order of said United States Board of Tax Appeals be and it hereby is reversed and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

74 [File endorsement omitted.]

75 [Clerk's certificate to foregoing transcript omitted in printing.]

76 — Supreme Court of the United States

Order allowing certiorari 7

Filed April 11, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

File No. 42,341. U. S. Circuit Court of Appeals, Second Circuit. Term No. 860. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Robert C. Winmill. Petition for a writ of certiorari and exhibit thereto. Filed March 12, 1938. Term No. 860 O. T. 1937.